MAR 23 2001

Nos. 00-596 and 00-597

Supreme Court, U.S.
FILED
MAR 23 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, et al.,

Petitioners,

– and –

ALTADIS U.S.A., INC., As Successor To Consolidated Cigar Corporation and Havatampa, Inc., et al.,

Petitioners,

v.

THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATE'S ATTORNEY OF DUPAGE COUNTY, COUNTY OF DUPAGE, ILLINOIS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND MASSACHUSETTS ASSOCIATION OF SCHOOL COMMITTEES, IN SUPPORT OF RESPONDENT

JOSEPH E. BIRKETT
State's Attorney
NANCY J. WOLFE
Chief, Civil Bureau
Office of the State's Attorney
County of DuPage, Illinois
505 North County Farm Road
Wheaton, Illinois 60187

RICHARD HODYL, JR.*
Special Assistant State's Attorney
County of DuPage, Illinois
WILLIAMS MONTGOMERY & JOHN, LTD.
Twenty North Wacker Drive, Suite 2100
Chicago, Illinois 60606
(312) 443-3200

**Counsel of Record for Amici Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The primary mission of the DuPage County State's Attorney's Office is to seek justice in each individual case. Joseph Birkett, State's Attorney for DuPage County, Illinois and the more than 175 attorneys, investigators, paralegals and support staff that work in the State's Attorney's Office, ensure the protection of the health and safety of the people of DuPage County, and especially the children of DuPage County, as well as the well being of the victims of crime. These concerns guide trial practice, policy development, program implementation and the actions of the professionals working in the DuPage County State's Attorney's Office.

The County of DuPage, Illinois, consists of approximately 332 square miles located approximately 30 miles west of Chicago. DuPage County is the second largest county in Illinois. With nearly one million residents, the County of DuPage has an active school system. There are 241 public schools in DuPage County, comprised of 164 elementary schools, 36 middle schools, 17 junior high schools and 24 high schools. In this school system, the parents, teachers, administrators and school support personnel of DuPage County educate, train, mentor and advise nearly 200,000 children each year.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief. Consent has been obtained from all parties pursuant to United States Supreme Court Rules to *Amici Curiae* filing this brief. The consent letters have been submitted with this brief.

The Massachusetts Association of School Committees, Inc., (hereinafter "MASC") is a Massachusetts Corporation incorporated under M.G.L. c. 180, and is located in Boston, MA 02109. The members of the MASC consist of approximately 310 Massachusetts school committees comprising cities, towns and regional school districts. The MASC represents the interests of its members in supporting and enhancing public elementary and secondary education in the Commonwealth. The MASC's general interest in the matter presented concerns the statutory authority conferred upon school committees to ban the use of tobacco products in schools, school buses, or school grounds (M.G.L.C. 71, S.37 H). The issues presented to the Court have substantial implications for the MASC's membership.

The National School Boards Association (hereinafter "NSBA") is a nonprofit federation that represents this nation's 95,000 school board members, who in turn serve more than 90 percent of the K-12 students in the nation. Founded in 1940, the NSBA is a federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the United States Virgin Islands. These board members govern 14,722 local school districts that serve more than 46.5 million public school students, approximately 90 percent of all elementary and secondary school students in the nation.

The rights of state and local units of government to take reasonable and necessary measures to ensure the health, safety and welfare of society's children is of profound concern to *Amici Curiae*.

SUMMARY OF ARGUMENT

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

The relief sought by petitioners presents a substantial threat to the ability of state and local governments across this nation to take reasonable and necessary measures to protect the health, safety and welfare of its children.

The petitioners and their *Amici* seek to gain unfettered discretion to peddle cigarettes and other tobacco products wherever and whenever they please.. If successful in their argument, petitioners rights to seek and attain corporate profits from tobacco sales will supercede the rights of mothers, fathers, teachers, principals, school boards, prosecutors and others acting in *parens patriae*, to create safe harbors where children are safe from the devastating effects of tobacco.

To accomplish this end, petitioners urge this Court to adopt an expansive interpretation of the Federal Cigarette Labeling and Advertising Act's preemption provision. Petitioners' arguments are unsupportable because no such preemption exists and this Court has been reluctant to infer preemption where it is not specifically provided under the law.

Petitioners further seek to attain First Amendment protections for tobacco advertising not previously

afforded to any other category of speech, whether political or commercial. This new level of absolute immunity from state regulation sought by petitioners is unprecedented.

Amici respectfully urge this Court to affirm that commercial speech is afforded a lesser constitutional level of First Amendment protection and that Massachusetts may restrict tobacco advertising near schools and playgrounds.

ARGUMENT

I. THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT DOES NOT PREEMPT A STATE'S RIGHT TO PROTECT THE HEALTH AND WELFARE OF ITS CHILDREN BY PLACING REASONABLE LIMITATIONS ON TOBACCO ADVERTISING.

A. Congress Only Reserved To Itself The Authority To Warn The Public About The Adverse Health Effects Of Cigarette Smoking And To Regulate The Content, Format And Placement Requirements For Health Warnings On Cigarette Packages, Advertisements And Billboards.

When Congress enacted the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. Sections 1331 et seq. (hereinafter "FCLAA") it did not reserve for itself the sole authority to govern all tobacco related advertising in the United States. To the contrary, Congress enacted the FCLAA for the limited purpose of ensuring that the public was informed about the health dangers of smoking by regulating advertising and labeling information. *Greater*

New York Metropolitan Food Council v. Giuliani, 195 F.3d 100 (2nd Cir. 1999). The FCLAA provides only a limited preemption and is not intended to serve as an absolute ban on states' rights to limit tobacco advertising. The FCLAA sets forth the clear intent of Congress that the objectives of the statutes were narrowly tailored to meet a specific goal:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health; whereby –
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. Section 1331.

The FCLAA clearly reflects Congress' objective to legislate specific rules to regulate tobacco advertising that were limited to the *context and format requirements for health warnings* on cigarette packages, advertisements and billboards. *Giuliani,* 195 F.3d at 106 (emphasis added). Congress' clear intent to govern and regulate health information and warnings about tobacco products was carried forward into the language of the FCLAA itself,

and in particular in the language of Section 1333. Section 1333 of the FCLAA established detailed requirements for tobacco advertising that carry forth Congress' express desire to ensure that the public was informed about the health dangers of smoking by regulating advertising and labeling information. These requirements included:

- required warning for packages, advertisements and billboards (15 U.S.C. Section 1333(a));
- required label statement formats and outdoor billboard statement formats (15 U.S.C. Section 1333(b)); and
- mandatory Federal Trade Commission approval of how the tobacco industry plans to rotate usage of various required warnings on tobacco product packages, advertisements and billboards (15 U.S.C. Section 1333(c)).

Congress has clearly barred any state from creating legislation or promulgating any regulation that expands or modifies in any way the tobacco product-related warning requirements set forth in the FCLAA. This narrow and limited preemption provision provides:

Sec. 1334. Preemption

- (a) Additional statements
  No statement relating to smoking health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) State regulations
  No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of

> which are labeled in conformity with the provisions of this chapter.

15 U.S.C. 1334.

When the provisions of the FCLAA are read together and taken as a whole, it becomes quite clear that Congress preempted state law in a very limited and narrow area of tobacco advertising. There is no language in the FCLAA that remotely supports the conclusion that Congress intended to summarily preclude any state from enacting reasonable limitations on tobacco advertising where such state laws are wholly unrelated to and do not conflict with the warnings required to be used by the tobacco industry when marketing tobacco products. Moreover, the FCLAA contains absolutely no language that clearly establishes that Congress intended to enact the FCLAA to strip states of their right to protect the health of children within their boundaries by shielding impressionable children from being exposed to tobacco product advertising in and around schools and playgrounds.

United States Courts of Appeals for the First, Second and Seventh Circuits have ruled that the FCLAA does not completely bar a state from enacting laws that restrict tobacco advertising. In *Giuliani, supra,* the United States Court of Appeals for the Second Circuit addressed the issue of whether a New York statute, which was called the "Youth Protection Against Tobacco Advertising and Promotion Act" and which was nearly identical to the Massachusetts regulation at issue in the instant case, was preempted under Section 1334(b) of the FCLAA. The

"Youth Protection Against Tobacco Advertising and Promotion Act" established a ban on the outdoor advertising of tobacco products within one thousand feet of any school building or playground. *Giuliani*, 195 F.3d at 106-07. The court held that the FCLAA did not preempt the New York statute. It reasoned that the purpose of Section 1334(b) was to enable Congress to inform the public of the health risks associated with smoking and, while so informing the public, Congress also sought to protect the national economy from the burden that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards. *See, Consolidated Cigar Corp., et al. v. Thomas F. Reilly*, 218 F.3d 30, 39 (1st Cir. 2000), *citing, Giuliani*, 195 F.3d at 106. The court in *Giuliani* refused to adopt the position that the FCLAA established a comprehensive ban on all state laws restricting tobacco advertising.

The United States Court of Appeals for the Seventh Circuit in *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 637 (7th Cir. 1999)(hereinafter "FAIR"), also refused to adopt the position that the FCLAA preempted all state laws restricting tobacco advertising. The FAIR court rejected an argument raised by tobacco advertisers that the FCLAA precluded the City of Chicago from restricting the advertising of tobacco and products. The FAIR court concluded that a literal reading of the FCLAA would improperly expand the scope of the FCLAA far beyond Congress' original intent:

> [I]f the FCLAA language ("with respect to advertising and promotion") were viewed with an "uncritical literalism," the effect would be to

> "read Congress' words of limitation as a mere sham, and to read the presumption against preemption out of the law wherever Congress speaks to the matter with generality."

Federation of Advertising Indus. Representatives, Inc. v. City of Chicago, 189 F.3d at 637, *quoting, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). The court then examined the legislative history of the FCLAA and set forth what *Amici* contend is the proper analysis for determining whether a state law is preempted by federal law:

> We therefore must read the language of the FCLAA preemption provision in light of Congress's desire not only to ensure uniformity of regulations with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

Federation of Advertising Indus. Representatives, Inc. v. City of Chicago, 189 F.3d at 638. The FAIR court reaffirmed the traditional rule that the placement and manner of outdoor advertising is a matter of traditional local concern and as such concluded that state law was not preempted by the FCLAA. *See, Consolidated Cigar Corp., et al. v. Thomas F. Reilly*, 218 F.3d at 40-41.

The United States Court of Appeals for the First Circuit reviewed the Massachusetts regulations that are at issue before this Court and refused to expand the limited preemption Congress established in the FCLAA. In *Consolidated Cigar Corp., et al. v. Thomas F. Reilly, supra*, the court found the courts' analysis in *Giuliani* and *Federation*

of Advertising Indus. Representatives, Inc. on the preemption issue compelling. The court ruled that the FCLAA did not preempt Massachusetts' tobacco advertising regulations because the regulations did not interfere with the labeling and advertising scheme established by Congress. *Consolidated Cigar Corp., et al. v. Thomas F. Reilly,* 218 F.3d at 41. The court reasoned:

> [T]o the extent that they [the Massachusetts regulations] create differing restrictions on the location of advertising in various states and municipalities, such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country. We do not consider such location restrictions to present the kind of "diverse, nonuniform, and confusing" advertising standards with which Congress was concerned when it enacted the FCLAA.

Consolidated Cigar Corp., et al. v. Thomas F. Reilly, 218 F.3d at 41.

The FCLAA's language and legislative history demonstrate that Congress did not intend to reserve for itself the sole authority to govern all tobacco-related advertising in the United States. The plain language of the FCLAA establishes that Congress enacted the FCLAA only for the limited purpose of ensuring that the public was informed about the health dangers of smoking by regulating advertising and labeling information. The FCLAA preempts state law in only a very limited fashion and clearly does not create an absolute ban on states' rights to limit tobacco advertising.

B. This Court Has Consistently Refused To Infer An Unexpressed Preemptive Purpose Into Federal Laws To Strike Down State Statutes, And Therefore The Tobacco Industry's Expansive Interpretation Of The FCLAA's Preemption Provision Should Be Rejected.

Amici urge this Court to flatly reject petitioners' expanded interpretation of the FCLAA. *Amici* respectfully request that this Court maintain its long standing commitment to examine statutes as a whole and in the full context in which the statute was enacted to determine the true meaning and application of a particular law. This comprehensive approach is of the highest importance where the rights of states to regulate tobacco advertising near school and playgrounds are at stake.

Justice Story aptly stated the cardinal rule, which is that the federal government can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be as such as are expressly given, or given by necessary implication. *See generally, Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). This Court has consistently refused to infer that a federal law preempts state law where the federal law does not specifically reserve for Congress the right to regulate or to govern a particular subject matter. *See generally, Cippollone, supra, citing, Medtronic v. Lohr*, 518 U.S. 470 (1996). In *Penn Dairies v. Milk Control*, 318 U.S. 261 (1943), this Court maintained that an unexpressed purpose of Congress to set aside state statutes that regulate local affairs is not lightly to be inferred and ought not to be applied where the legislative

command read in the light of its history remains ambiguous. Similarly, in *Great Lakes Dredge and Dock Co. v. Charett*, 319 U.S. 293 (1943), this Court stated that the powers of a state to govern men and things will not be lightly stricken down by implication.

To determine whether a federal statute supercedes a state law or whether Congress has occupied a given field in such a way as to exclude the operation of state laws, the entire scheme of the federal statute must be considered and whether the Congress has excluded state action in a particular field depends on the facts in the particular case and the congressional intent, irrespective of the coincidence of terms or words that may be used in both the state and federal statutes. *People of the State of California v. Zook*, 336 U.S. 725, *reh'g denied*, 337 U.S. 921 (1949). The nature of the power executed by Congress, the object sought to be attained, and the character of the obligation imposed by law are important in determining whether supreme federal enactments preclude the enforcement of state laws on the same subject. *Hines v. Davidowicz*, 312 U.S. 52 (1941).

Judge Learned Hand recognized the dangers of examining portions of statutes out of context. Judge Hand understood that unintended consequences can result where a court applies a strict literal interpretation to particular words within a statute without consideration of the entire statute. Judge Hand cautioned:

> [t]here is no more likely way to misapprehend the meaning of the language – be it in a constitution, a statute, a will or a contract – than to read the words literally, forgetting the object

> which the document as a whole is meant to secure.

Giuliani, 195 F.3d at 105, *citing*, *Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2nd Cir. 1947).

Here, petitioners' pray that this Court will ignore the wisdom of Judge Hand, discard Congress' true intent when it enacted the FCLAA, and adopt the petitioners' expanded interpretation of the preemption provision in the FCLAA. *Amici* urge this Court to reject this expansive interpretation of the FCLAA's preemption provision. Because the FCLAA does not contain the express preemption of state tobacco restrictions, none should be inferred by this Court.

C. The Massachusetts Tobacco Advertising Restrictions Do Not Conflict With The FCLAA And Thus They Are Not Preempted By The FCLAA.

The Massachusetts tobacco regulations restrict tobacco advertising around schools and playgrounds, where children assemble to play and learn. The FCLAA, on the other hand, creates the universe of the nature and types of warnings that the tobacco industry is required to employ when packaging tobacco products and advertising these products to the general public. There is no connection, and certainly no conflict between the State of Massachusetts' goal of protecting children from the harmful effects of tobacco products and Congress' desire to create a uniform and nondiverse national program for cigarette warnings on tobacco packaging and advertising. Where no conflict exists between a state law and federal

law that address the same general subject area, the federal law does not preempt state law.

The Supremacy Clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land." U.S. Const. art. VI, cl. 2. Accordingly, the "relative importance to the State of its own law is not material when there is a conflict with a valid federal law." *Felder v. Casey*, 487 U.S. 131, 138 (1988). Any state law that is clearly within a State's acknowledged power, but that interferes with or is contrary to federal law, must yield. *Felder*, 487 U.S. at 138. Hence, a state law at odds with federal law is preempted by federal law.

Conversely, where the state law does not conflict with federal law, the state law is not preempted by federal law. In the instant case, there is no real or apparent conflict between the Massachusetts tobacco advertising restrictions and the FCLAA. The Massachusetts tobacco regulations restrict tobacco advertising in locations heavily populated by young children such as schools and playgrounds. These state regulations do not alter or affect Congress' labeling strictures that involve the general marketing of tobacco products to adults. The FCLAA mandates the use of specific warning labels when tobacco industry packages and advertises tobacco products. The purpose and effect of the state regulations and the FCLAA do not intersect. Accordingly, there is no conflict between the two that justifies preemption of the Massachusetts regulations.

Moreover, the Massachusetts tobacco advertising restrictions do not frustrate Congress' ability to carry out the purpose of the FCLAA. In order to invalidate a state statute under the supremacy clause, a court must first conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. *Colorado Antidiscrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). Congress will be deemed to have intended to supercede local law when and only when the local law in terms of its practical administration conflicts with the act of Congress or plainly and palpably infringes on policy. *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). The Massachusetts regulations do not hamper Congress' ability to regulate health warnings on cigarette packages, advertisements and billboards. Accordingly, the FCLAA does not preempt the Massachusetts regulations.

II. A STATE MAY RESTRICT COMMERCIAL ADVERTISING OF TOBACCO PRODUCTS TO PROTECT THE HEALTH AND SAFETY OF CHILDREN WITHIN ITS GEOGRAPHIC BOUNDARIES.

A. The Health And Safety Of Children Constitutes A "Substantial Interest" Which Clearly Justifies A State's Right to Restrict Tobacco Advertising Near Schools And Playgrounds.

It is beyond dispute that states have broad power to establish and enforce standards of conduct within their borders relative to the health of everyone there. *See generally, Barsky v. Board of Regents*, 347 U.S. 442 (1954). It is a vital and integral responsibility within the state's police

power. *Id.* There can be no doubt that upon the proper occasion and by the appropriate means, a state may regulate a business and any of its aspects. *Nebia v. New York,* 291 U.S. 537 (1934).

Amici aver this is especially true when activities of the business may have a detrimental and harmful impact on the health and safety of children. This Court has affirmed this view and has consistently recognized that a government may act more protectively where children are concerned. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975). The law is well-settled that a state or municipality can adopt more stringent controls on communicative materials available to children than on those available to adults. *Erznoznik,* 422 U.S. at 212. Children deserve special solitude in the First Amendment balance because they lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke,* 101 F.3d 325, 329-30 (4th Cir. 1996).

This Court has long undertaken the role of a champion of protecting children's health and welfare in numerous cases where the interests of children were balanced against commercial free speech interests. In *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), this Court approved extra restrictions on speech on the radio because of the pervasiveness of the medium and the presence of children in the audience. In *Ginsburg v. New York,* 390 U.S. 629 (1968), this Court sustained a law which protected children from non-obscene literature. And while this Court has acknowledged a right to private possession of mature entertainment materials in private residences, *see generally, Stanley v. Georgia,* 394 U.S. 557,

566 (1969), this Court has allowed stringent legislative responses to "destroy a market for the exploitative use of children." *Osbourne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This Court has afforded children this special safeguard to ensure that children do not become lost in the marketplace of ideas. *See generally, Anheuser-Busch*, 101 F.3d at 330.

The potential ramifications of the instant case pose a real threat to the healthy, well-rounded growth of society's children. The devastating effect that tobacco advertising has on children when it is situated near schools and playgrounds has been studied and well-documented.

In 1994, the United States Surgeon General published a report entitled *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* which concluded "Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking" and "cigarette advertising appears to increase young people's risk of smoking." JA 102-103. This report further found that among all persons who had ever been daily smokers, 81.9% first tried a cigarette before age 18. JA 103.

In 1995, the Food and Drug Administration (hereinafter "FDA") performed an analysis of the evidence relating cigarette and smokeless tobacco advertising to children's smoking initiation and concluded:

> The agency concludes that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: 1) A causal relationship between advertising and youth smoking behavior; and 2) a positive effect of stringent advertising measures on smoking rates and on youth smoking. . . . Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption. Therefore, the agency finds that stringent restrictions on advertising are *essential* if smoking by adolescents is to be reduced.

JA 103 (emphasis added).

In 1994, the National Academy of Science's Institute of Medicine issued a report entitled: *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths* which concluded that tobacco advertising and promotion undoubtedly contribute to the multiple convergent psychosocial influences that lead children to begin using tobacco products and to become addicted to them. JA 104.

A 1991 study entitled "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children" published in the *Journal of the American Medical Association* reported that in just three years after Camel's Old Joe cartoon character advertising campaign began, the proportion of smokers

under 18 years of age who chose Camel brand cigarettes rose from 0.5% to 32.8%. JA 111-112.

These studies clearly establish that tobacco advertising severely impacts our nation's children and has grave and serious consequences with regard to their health. These serious health concerns clearly constitute a "substantial interest" to Massachusetts.

The federal government has no monopoly over the regulation of local advertising where such advertising threatens the health and safety of children. Massachusetts, just as each and every other state in this nation, has broad police power to adopt tobacco advertising restrictions designed to protect the health and safety interests of its citizens, and especially of its children. Congress left to the states local police powers to protect their children when it created the limited preemption in the FCLAA. Congress' actions are consistent with this Court's teachings in *Townsend v. Yeomans*, 301 U.S. 441, 451 (1937), where this Court stated that a state, acting within its sphere, is presumed to best know the needs of the people within its boundaries. *Amici* respectfully request that this Court continue to protect states' rights to protect the health and safety of their children by ruling in favor of respondent.

B. The First Amendment Is Not Absolute And Thus Tobacco Advertising Is Not Immune From State Regulation.

Since this Court rendered its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), commercial speech has been afforded

some level of protection under the First Amendment from unwarranted governmental interference. Petitioners and their *Amici* hope to expand this Court's ruling in the *Virginia Pharmacy Board* case to such a degree that all tobacco advertising will be virtually immune from any and all state regulation. In other words, petitioners' and their *Amici* seek to elevate tobacco advertising to a degree that goes even beyond constitutional protections that are traditionally afforded to political speech. The petitioners' wishes are contrary to prior decisions made by this Court and should be rejected.

This Court has long afforded substantial constitutional protection only to true political speech where, unlike tobacco advertising, profit is not the central motive. For example, this Court has long held that the First Amendment shields such acts as saluting the flag as well as refusing to do so. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). The First Amendment shields an individual's right to wear an armband to protest a war. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969). This Court has held that displaying a red flag is also protected under the First Amendment, *Stromberg v. California*, 283 U.S. 359, 369 (1931), as well as "marching, walking or parading" in uniforms displaying the swastika. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). The speech in each of these cases sought to advance traditional notions of political thought, protest and societal change. Tobacco advertising, on the other hand, seeks to generate profits for the tobacco industry.

However, even true political speech is not immune from governmental restriction. This Court has refused to

extend unlimited First Amendment protection to all forms of political speech even though this nation treasures political speech as the cornerstone of its democracy. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the legislative branch's limitations on campaign contributions. This Court reasoned that the potential for corruption and the avoidance of the appearance of improper influence was a sufficiently important concern to justify legislative limitations on campaign contributions. Similarly, in *Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al.*, 528 U.S. 377 (2000), this Court again upheld as constitutional state limitations on campaign contributions despite the political nature of the donations. This Court reasoned that the danger of corruption in the electoral system is a sufficient state interest to uphold limitations placed on campaign contributions.

It is important to note that this Court has also restricted other forms of speech where profit was not the central motive and where the speaker asserted that their speech was, in a broad sense, an "exchange of ideas." In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court ruled that fighting words fall beyond the scope of the First Amendment. In *Beauharmais v. Illinois*, 343 U.S. 250 (1952), this Court ruled that group libel is not afforded protection under the First Amendment. Similarly, in *FCC, supra*, 438 U.S. at 726, this Court denied constitutional protection to indecent speech. A similar conclusion was reached by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) with regard to defamatory falsehood.

This Court has recognized that commercial speech, like tobacco advertising, may be restricted in certain circumstances because commercial speech is not afforded the same, heightened level of protection under the First Amendment traditionally given to political speech. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). This Court has recognized the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ohralik*, 436 U.S. at 455-456.

The petitioners and their *Amici* in essence have asked this Court to grant the tobacco industry unfettered discretion to peddle cigarettes and other tobacco products wherever and whenever they please, even nearer to the front steps of schools. No such absolute right has previously been extended to commercial speech by this Court. If successful in their argument, petitioners' rights to seek and attain corporate profits from tobacco sales will supercede the rights of mothers, fathers, teachers, principals, and those acting in *parens patriae* of children to create a safe harbor where children can be safe from the devastating effects of tobacco.

C. A State's Restrictions On Tobacco Advertising Pass Constitutional Muster If They Have A Reasonable Relation To The Goal Of Protecting Children's Health.

Once a state has identified a substantial interest that supercedes the First Amendment protections afforded to commercial speech, the state is not required to employ

the least restrictive means to promote that substantial interest. *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989). Here, Massachusetts has established that the health and safety of children living within its boundaries, and the negative effect tobacco advertising has on the health of children, are substantial interests that supercede any First Amendment protection that tobacco advertising may have otherwise had in the absence of these substantial interests. Massachusetts is not required to seek out and use the least restrictive means available to protect children from the negative effects of tobacco advertising.

Petitioners and their *Amici* have suggested that a state is required, or should be required, to apply the least restrictive means test when restricting commercial speech. *Amici* recognize that this Court in dicta in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) suggested that the least restrictive means test be applied in commercial speech cases. However, this Court did not adopt the least restrictive means test in its holding in *Central Hudson*. Furthermore, this Court has not adopted the use of the least restrictive means test in any subsequent commercial speech case. To the contrary, this Court has specifically held that the least restrictive means test is not required in commercial speech cases. *Fox, supra.*

Justice Scalia, writing for the Court in *Fox*, emphasized that commercial speech is afforded lesser protection in the spectrum of First Amendment protections. *Id.* Therefore, Justice Scalia concluded that to apply the least restrictive means test would raise commercial speech to a higher level of First Amendment protection than it has

been previously afforded by this Court. *Id.* Jusice Scalia stated:

> In sum, while we have insisted that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," . . . we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decisionmakers to judge what manner of regulation may be best employed.

Id., citing, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) *and citing In re R.M.J.,* 455 U.S. 191 (1982).

Massachusetts is not required to use the least restrictive means to protect children from the adverse health effects of tobacco advertising. Massachusetts is required only to demonstrate that its tobacco advertising restriction is reasonably related to protecting childrens' health and that its tobacco restrictions are narrowly tailored to achieve that purpose.

The Massachusetts regulations at issue here clearly satisfy this Court's test. The regulations were promulgated after the Massachusetts Attorney General thoughtfully consulted the volumes of studies that conclude tobacco advertising has a negative impact on children. The regulations impose advertising restrictions only in those limited areas where it is certain that large groups of children regularly go – schools and playgrounds. These regulations do not restrict the tobacco industry from peddling its products in any other geographic region beyond the narrowly tailored 1000 foot zone established by the regulations. Massachusetts' regulations clearly satisfy this Court's "reasonableness" test as set forth in *Fox*, and therefore should be upheld by this Court.

CONCLUSION

Amici Curiae County of DuPage, Illinois, National School Boards Association and Massachusetts Association of School Committees respectfully request that this Court continue its role in protecting the health and safety of this nation's posterity by ruling in favor of Respondent Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts.

Respectfully submitted,

JOSEPH E. BIRKETT
State's Attorney
NANCY J. WOLFE
Chief, Civil Bureau
Office of the State's Attorney
County of DuPage, Illinois
505 North County Farm Road
Wheaton, Illinois 60187

RICHARD HODYL, JR.*
Special Assistant State's Attorney
County of DuPage, Illinois
WILLIAMS MONTGOMERY & JOHN, LTD.
Twenty North Wacker Drive, Suite 2100
Chicago, Illinois 60606
(312) 443-3200

**Counsel of Record for Amici Curiae*

March 23, 2001